FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

INTOWN PROPERTIES,	)	
Appellant,	)	**D.C. CIV. APP. NO. 1997/054**
	)	
v.	)	Re: T.C. CIV. NO. 897/1994
	)	
MARIO A. CASTRO,	)	
Appellee.	)	
	)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: December 7, 2000
Filed: September 5, 2001

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **RHYS S. HODGE**, Judge of the Territorial Court of the Virgin Islands, Sitting by Designation.

APPEARANCES:

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Attorney for Appellee.

OPINION OF THE COURT

PER CURIAM

The issue presented in this appeal from a petition for writ of review is whether the trial judge erred in finding that the decision of the hearing officer was arbitrary and capricious. For the reasons stated below, we will vacate the opinion and orders of

the trial court and remand for reinstatement of the administrative decision.

I. FACTS AND PROCEDURAL HISTORY

On February 17, 1992, the Royal America Company hired Mario Castro ("Castro" or "appellee") to work as a plumber at its Bethlehem Village apartments. In early August 1992, the Royal America Company was replaced by Intown Properties, Inc. ("Intown" or "appellant") as property manager of Bethlehem Village. (Joint Appendix ("J.A.") at 42.) During his employment, Castro was reprimanded several times for his conduct. Despite Intown's concerns about his conduct, Castro was promoted to Maintenance Supervisor at a new hourly pay rate of $11.25, effective April 15, 1993. On July 26, 1993, Castro's services were terminated in a letter (effective July 27) signed by project manager, Kay Williams, on behalf of David C. Johnson ("Johnson"), Intown's Caribbean Regional Manager.

On July 27, 1993, Castro filed a wrongful discharge complaint with the Department of Labor. A hearing was held on February 14, 1994 before Hearing Officer, Anya Encarnacion ("Encarnacion"), who subsequently dismissed the matter on March 14, 1994 for lack of jurisdiction. Encarnacion found, in relevant part, that the National Labor Relations Board ("NLRB"), and not the Department of

Labor, had jurisdiction to hear the matter. (J.A. at 3-9.) A motion for reconsideration was filed, and, on September 30, 1994, Administrative Law Judge, J. Encarnacion ruled that the Department of Labor had jurisdiction to hear Castro's wrongful discharge claim because his status as a supervisor took him outside the realm of the NLRB.

That same day, September 30, hearing officer Encarnacion issued an opinion that Intown's request that Castro terminate the four temporary workers was a reasonable instruction to a supervisor, and further found that Castro intentionally disobeyed that instruction. (*Id.* at 18-23.) The conclusion, therefore, was that Castro's discharge had not been wrongful. Castro appealed that decision to the Territorial Court. The Territorial Court vacated the hearing officer's memorandum and order after finding that the findings therein were arbitrary and capricious. Accordingly, the trial court ordered that Castro be reinstated as maintenance supervisor and awarded back pay from July 27, 1993 to the date of reinstatement. This appeal followed.

II. DISCUSSION

A. Jurisdiction and Standards of Review

This Court has appellate jurisdiction to review judgments and

orders of the Territorial Court in all civil cases. V.I. CODE ANN. tit. 4, § 33 (1997 & Supp. 2000); Section 23A of the Revised Organic Act of 1954.[1]

This Court exercises plenary review of the Territorial Court's application of legal precepts, and findings of fact are reviewed for clear error. *Thomas v. Abamar-BB*, 35 V.I. 117, 934 F.Supp. 164 (D.V.I. App. Div. 1996); *Nibbs v. Roberts*, 31 V.I. 196, 204 (D.V.I. App. 1995); 4 V.I.C. § 33.

A reviewing court reviews an agency's reasoning to determine whether it is "arbitrary" or "capricious," or, if bound up with a record-based factual conclusion, to determine whether it is supported by "substantial evidence." *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 89-93, 63 S.Ct. 454 (1943). The trial court reviewing an administrative agency's decision may not re-weigh the evidence, and the hearing officer's findings "with respect to questions of fact shall be considered conclusive if supported by substantial evidence on the record considered as a whole." 24 V.I.C. § 78; *see Thomas v. Chater*, 34 V.I. 364, 367, 933 F.Supp. 1271, 1273 (D.V.I. 1996).

Substantial evidence is not "a large or considerable amount of

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[1] The Revised Organic Act of 1954 is found at 48 U.S.C. § 1613a (1994), *reprinted in* V.I. CODE ANN., Organic Acts, 73-177 (codified as amended) (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"].

evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove*, 181 F.3d 403, 408 (3d Cir. 1999) (citations omitted). In determining whether the evidence before an agency was substantial, a court views the record in its entirety and takes account of evidence unfavorable to the agency's decision. *Id.* (citation omitted). Except in extraordinary circumstances, judicial review of an administrative agency's decision is limited to those issues considered by the agency. *Hess Oil Virgin Islands Corp. v. Richardson*, 32 V.I. 336, 894 F.Supp. 211 (D.V.I. App. Div. 1995).

B. The trial judge erred in finding that the decision of the hearing officer was arbitrary and capricious.

The relationship between Intown and its employees was contentious from the very beginning, with Castro being the employees' most vocal representative. Castro contends that the day after Intown took over, management called a meeting wherein Margaret McGhee ("McGhee") told the employees that Intown "could fire and hire anytime." The employees challenged this policy, essentially stating that such action would be in violation of the Virgin Islands Code.

Then, Castro contends, the parties started "fighting" over the manner in which wages were being paid. (J.A. at 42.)

Specifically, Castro contends that they were being paid sporadically from a personal off-island account which often resulted in delayed payments. Castro contacted the Acting Director of the Division of Labor Relations, Mr. Bernadine Bailey ("Bailey") for assistance in the pay dispute, and, with Bailey's assistance, they came to an agreement with Intown.

On another occasion, Castro contends that Intown wanted its employees to sign a document agreeing to follow all company procedures and also agreeing that they could be terminated with or without cause. Again, Castro took the lead and instructed his fellow employees not to sign the document. Castro contacted Bailey, who advised Intown that the employees had no duty to sign the document because the new terms were being instituted subsequent to their hiring, and he also advised the employees not to sign the agreement. (*Id.* at 64.)

In this environment, Castro clearly considered himself a leader who "brought the union" to Intown,[2] a "strong man fighting" on behalf of his fellow employees in what seemed like "hand-to-hand combat". (*Id.* at 42, 49, 53-54, 82.) Johnson, Intown's Caribbean Regional Manager, testified that they "found Mr. Castro to be

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[2] Union negotiations began in January 1993, and there was no existing union contract during Castro's tenure with Intown. (J.A. at 54, 67, 69-70.)

continuously in an argumentative mode," and that the performance of the employees was "affected accordingly." (*Id.* at 36, 83.) During the administrative hearing, Castro even referred to someone at Intown as a "dumb bitch". (*Id.* at 71.)

The Virgin Islands Code provides several grounds for discharge:

> (a) Unless modified by contract, an employer may dismiss any employee:
> (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
> (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
> (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
> (4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
> (5) who performs his work assignments in a negligent manner;
> (6) whose continuous absences from his place of employment affect the interests of his employer;
> (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
> (8) who is dishonest; or
> (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.
> (b) The Commissioner may by rule or regulation adopt additional grounds for discharge of an employee not inconsistent with the provisions enumerated in subsection (a) of this section.
> (c) Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged; however,

> nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protected by this title.

24 V.I.C. § 76.[3]

Intown issued several warnings to Castro, the first of which was on October 7, 1992. That first warning arose out of an incident on October 6, 1992 when Castro allegedly argued with Ted A. Thomas ("Thomas"), McGhee, the on-site manager, and Vincent Lescott ("Lescott"), his direct supervisor. During the argument, Castro repeatedly referred to Lescott as a "joke", and, although warned that his statement was considered an act of "insubordination" in violation of company policy, Castro persisted in the name-calling. Two days after this warning, on October 9, presumably as a result of discussions between Intown, Castro, and Bailey, this warning was allegedly expunged, and Castro was given a "fresh start". (*Id.* at 64, 87.)

Lescott was subsequently terminated from his position, and, against Bailey's advice, Castro accepted the position of maintenance supervisor on April 15, 1993. (*Id.* at 65, 88.) Almost

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[3] On February 21, 1996, after commencement of this matter, 24 V.I.C. § 76 was amended to state, "unless modified by union contract . . . ." (Emphasis added).

three months later, on July 6, 1993, Castro was sent a written Letter/Notice of Reprimand for his "argumentative behavior" and "insubordination" in refusing to terminate four temporary employees (ground workers). (*Id.* at 35-36, 89.) As the trial court noted, that reprimand (which Castro refused to sign) further provided that "[i]f three written reprimands are given to you within a three month period for any of the above infractions of company polices [sic], this will be grounds for immediate dismissal/termination." (*Id.* at 89; Supplemental Joint Appendix ["Supp. J.A."] at 102 n.8.)[4]

Then, on July 15, 1993, the tenants of several units wrote a letter of complaint to Intown about Castro's offensive language, favoritism and neglect of duties. (J.A. at 92.) Castro contends that the signatures on the tenants' letter were forged by Johnson. (*Id.* at 39.) Johnson alleged that the reason the tenants were not willing to come forward at the hearing was fear of reprisal from Castro. (*Id.* at 40.) Johnson terminated Castro's services on July 27, 1993.

With these facts before her, and after considering the language of 24 V.I.C. § 76, the hearing officer found in relevant

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[4] The record shows that Intown changed the format and content of its reprimand form between 1992 and 1993, and included the language indicated, but neither the parties nor the hearing officer made any direct reference to the number of reprimands needed to justify discharge within a given period.

part that:

> Complainant was instructed by the Respondent to terminate four employees. It was a reasonable request from the Respondent, and also management's prerogative, to ask Complainant in his supervisory capacity, to terminate the four employees, if the company could no longer afford to pay them. It was Complainant's duty to obey reasonable instructions of the employer. His refusal to terminate the four employees supports a finding that he intentionally disobeyed a reasonable instruction of the employer.
>
> Respondent asked Complainant to stop the argumentative behavior and insubordination in connection with the request to terminate the four employees. It was reasonable for Respondent to ask Complainant to follow an order from his superior to stop the argumentative behavior and insubordination to management in connection with [the] request to terminate the employees, because his subordinates would view his actions and emulate the same behavior. The rules against argumentative behavior and insubordination were company policy, and were made known to Complainant. Complainant's refusal to stop the argumentative behavior and insubordination in connection with the request to terminate the employees, and his prior infraction, that involved an act of insubordination, for which he received a written warning supports a finding that he intentionally disobeyed a reasonable rule of the employer.

(J.A. at 22-23.)

"Clear error" or "clearly erroneous" are "terms of art signaling court/court review." *Dickinson v. Zurko*, 527 U.S. 150, 158 (1999). Less stringent standards which permit a court to set aside agency findings found to be arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence, apply to the lower court's review of agency findings (court/agency review). *Id.*

at 164. Traditionally, the "court/court standard of review has been considered somewhat stricter (i.e. allowing somewhat closer judicial review)" than the court/agency standards. *Id.* at 153 (citation omitted). As the Supreme Court states in *Dickinson*, the difference between the two standards, however, "is a subtle one--so fine that . . . we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." *Id.* at 162-63.

The trial judge relied upon the standard set forth in *Branch v. Bryan* for reviewing the actions of an administrative agency:

> (1) Whether the agency findings are supported by substantial evidence on the record;
>
> (2) Whether the agency has acted within the limits of its statutory powers; and
>
> (3) Whether the agency had abused its discretion by acting in an arbitrary and capricious manner.

18 V.I. 54, 56 (D.V.I. 1980). Applying this standard, the Territorial Court judge found that the hearing officer had arbitrarily and capriciously determined that Castro had not been wrongfully discharged. We disagree.

For the reasons set forth below, the trial judge's decision to vacate the administrative agency decision was clearly erroneous. The hearing officer was in the best position to assess witness

credibility and observe Castro's argumentative conduct firsthand. This discussion focuses only on Castro's conduct as a supervisor, because the uncontested evidence indicates that he was given a fresh start after the reprimand in October 1992.

Duties of a Supervisor[5]

Intown contends that in granting Castro's request for reconsideration of the dismissal for lack of jurisdiction, the Administrative Law Judge relied upon a case that provided the definition of a supervisor:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, **discharge**, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (emphasis added); *Global Marine Development of California, Inc. v. N.L.R.B.*, 528 F.2d 92, 94 (9th Cir. 1975). Castro argues that "[t]here was no evidence or findings as to Appellee's specific duties and responsibilities as a maintenance supervisor." (Brief of Appellee at 9.)

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[5] In light of *The St. Thomas-St. John Hotel & Tourism Association, Inc. v. Government of the U.S. Virgin Islands,* 218 F.3d 232 (3d Cir. 2000) this Court does not address the issue of whether supervisors are covered by the Wrongful Discharge Act for several reasons: (1) the matter below was filed in 1994; (2) the issue was not raised; and (3) the issues addressed in *The St. Thomas-St. John Hotel & Tourism Association, Inc.* would not affect the outcome of this case.

The trial judge found that the hearing officer "presumed that in light of Castro's supervisory position, it was his duty to fire employees," (Supp. J.A. at 101), and further found that merely being employed in a supervisory capacity does not automatically imbue one with the power and responsibility to terminate employees. (*Id.*) The trial judge, therefore, found the "Hearing Officer's conclusion that the order to terminate the employee was a reasonable request" to be arbitrary and capricious. (*Id.*) We disagree, and find that the trial judge ignored the statutory duties of a supervisor.

In his letter to Johnson dated July 13, 1993, Castro did not state that it was not his role as a supervisor to fire employees, but, rather, that he "needed to keep these four men for extended work." (J.A. at 91.) While we agree with the trial judge that the record does not support the hearing officer's finding that Castro "was made aware of the company rules and procedures and what his duties would be as a maintenance supervisor," (*id.* at 21), the statutory definition of a supervisor should have carried more weight than it was accorded in this case. Moreover, the agency decision is considered conclusive if supported by "substantial evidence on the record considered as a whole" and requires deferential review.

Castro's Act of Insubordination and Argumentative Behavior Warranted his Dismissal.

Castro also argues that the hearing officer relied upon a reprimand that had been expunged from his employment record in 1992. Intown argues that this argument is "irrelevant" because Castro's act of insubordination in 1993 was enough to warrant dismissal pursuant to 24 V.I.C. § 76(a)(4).

The hearing officer was privy to all the disputes between Castro and Intown during his employment and recited them in her statement of facts. She then based her discussion primarily on Castro's failure to carry out Intown's reasonable request that he terminate four employees. The hearing, officer erred, however, in also finding that Castro's "prior infraction[] that involved an act of insubordination, for which he received a written warning supports a finding that he intentionally disobeyed a reasonable rule of the employer." (J.A. at 23.) The trial court correctly noted that the hearing officer should not have considered the October 1992 reprimand to justify dismissal. While that infraction should not have been considered, Intown is correct that Castro's insubordination in 1993 was itself a ground for dismissal.

The trial judge further stated that the "only finding made by the hearing officer with regard to this incident is that "'[o]n July 6, 1993 Complainant was then given a Notice of Reprimand for

argumentative behavior and insubordination.'" (Supp. J.A. at 101.) The trial judge noted the language in the July 6 reprimand which says that three written reprimands within ninety days will be grounds for immediate termination. The court, therefore, concluded that "[t]here is no finding that the cumulative effect of the reprimands justified Castro's dismissal." (*Id.* at 102.)

Section 76 provides that "unless modified by contract, an employer may dismiss any employee." 24 V.I.C. § 76. The trial judge's finding that "the record does not offer any evidence that Castro engaged in argumentative behavior and insubordination," (Supp. J.A. at 101), is clearly erroneous. Because the document containing this new provision was not a "contract", Intown was not required to have three written reprimands prior to terminating Castro. His single act of insubordination evidenced by the July 6, 1993 reprimand was a sufficient ground for termination based upon the facts presented and pursuant to 24 V.I.C. § 76(a)(4). There was substantial evidence to support a finding that Castro wilfully and intentionally disobeyed Intown's reasonable instructions to terminate the four employees.

III. CONCLUSION

For the reasons stated, this Court will vacate the November

13, 1996 opinion and order, as well as the order denying reconsideration dated April 7, 1997 on grounds that the trial judge's findings were clearly erroneous. We remand this matter to the Territorial Court with the direction to reinstate the administrative agency's decision.

ENTERED this 5th day of September 2001.

A T T E S T:
WILFREDO MORALES
Clerk of the Court

/s/
_____
By: Deputy Clerk